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No. 03-938

In the Supreme Court of the United States

ROBERT F. CHRISTIAN, II, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a white male military officer cannot prevail on a claim of discrimination and receive full back pay and benefits, based on a claim that the instructions used by the military retention board impermissibly favored women and minorities, if the government can demonstrate that that military officer would not have been retained even absent the allegedly biased instructions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 337 F.3d 1338. The opinion of the Court of Federal Claims (Pet. App. 24-44) is reported at 49 Fed. Cl. 720. An earlier opinion of the Court of Federal Claims (Pet. App. 45-101) is reported at 46 Fed. Cl. 793.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2003. A petition for rehearing was denied on October 3, 2003 (Pet. App. 102). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. By statute, the Army and the other military services are permitted to convene selection boards to recommend officers for early retirement. See 10 U.S.C. 611, 638; see also 10 U.S.C. 638a. In January 1992, the Secretary of the Army appointed the Fiscal Year 1992 Lieutenant Colonel Selective Early Retirement Board (Retirement Board or Board) to recommend Army lieutenant colonels for involuntary early retirement. Pet. App. 2. The Secretary issued lengthy detailed instructions to the Board, which was told to select for early retirement a "minimum" of 1210 officers and an "optimum" of 1452. *Ibid.* "[B]ased on the guidance" in the instructions, the Retirement Board was directed to "determine which officers to recommend for selective early retirement by first determining an order of merit list of the officers considered." *Ibid.* In addition, the instructions contained procedures designed to meet the Army's equal opportunity (EO) goals. *Id.* at 2-4.

In accordance with the Secretary's instructions, the Board used a four-phase procedure in selecting the candidates for early retirement, only two of which are relevant here. Pet. App. 4-5. During Phase I, the Board members reviewed and scored all of the candidates' records, establishing a comprehensive order of merit. *Id.* at 4. In performing that task, the Board members were instructed that there was a "goal" to "achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration." *Id.* at 3. The members were also instructed that, when evaluating the records "of minority and female officers," they should "consider that past personal and institutional discrimination may have disadvantaged minority and

female officers." *Ibid.* The instructions explained that such "discrimination may include, but certainly is not limited to, disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career-building military schools." *Ibid.*

During Phase II, the Board selected the "optimum number" of officers for early retirement, and applied it to the list created during Phase I. Pet. App. 4. After the 1992 Board completed this phase, the retention rates for blacks, Hispanics, and Native American officers were lower than the anticipated retention rates. The applicable instructions required the Board to re-evaluate the records of minority and female officers if there were adverse deviations in the selection rates of these groups from the overall selection rates. *Ibid.* The instructions also mandated that the Board revote the ratings on the records of an officer if the Board members determined that the record evidenced past discrimination against the officer. *Id.* at 4-5.

At the end of this process, the Board recommended 1052 white male lieutenant colonels for early retirement, with 3067 retained; and 131 minority and female officers for early retirement, with 341 retained.[1] Pet. App. 4-5.

2. Plaintiff, Lieutenant Colonel Robert F. Christian, II, is a white male, who was selected for mandatory early retirement by the 1992 Board. He brought this class action in the Court of Federal Claims challenging the constitutionality of the EO instructions employed

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[1] There likely is some overlap and redundancy between the number of female officers and the number of minority officers listed above, because of, for example, double counting of minority females.

by the 1992 Board. Pet App. 5. The court certified the class, and on cross motions for summary judgment held that the instructions used by the 1992 Board impermissibly favored minorities. *Id.* at 5-6.

On July 10, 2001, the court issued a second opinion, addressing the issue of injury to the class members. C.A. App. 31. The court rejected the government's proposed "harmless error" analysis, under which the goernment proposed to establish a new selection board to determine which retired officers were harmed by the instructions, *i.e.*, who would have been retained had the instructions not been given. Pet. App. 6. The court ruled that, even though, at most, only 341 women and minorities were retained by the 1992 Board, the entire class of approximately 1030 non-minority male officers had been harmed by the unconstitutional procedures and were thus entitled to active duty back pay from the date they were improperly separated and other constructive service remedies until the date they are properly separated. *Ibid.*

After it issued its ruling on the issue of injury, the court certified the case for appeal under 28 U.S.C. 1292(d)(2). Pet. App. 7.

3. The Federal Circuit granted the government's petition for interlocutory review, and reversed the court's ruling on the issue of injury. Pet. App. 7-23.

The court of appeals held that the government had a right to demonstrate which class members were not harmed by the improper instructions. Citing, *inter alia*, *Texas* v. *Lesage*, 528 U.S. 18 (1999), and *Mt. Healthy City Bd. of Edu.* v. *Doyle*, 429 U.S. 274, 287 (1977), the court explained that the doctrine of "harmless error" was a well-established principle of federal law. Pet. App. 7-9. The court observed, "the Supreme Court has recognized that a harmless error analysis is

appropriate even for constitutional claims." *Id.* at 9. Moreover, the court recognized that the Federal Circuit "and its predecessor court have applied the harmless error analysis to military back pay cases." *Id.* at 10. The court explained, "[u]nder this authority, an officer cannot prevail in a challenge to a discharge after non-promotion if the government can demonstrate that, notwithstanding the error in the promotion proceedings, the officer still would not have been promoted." *Id.* at 10-11.

The court of appeals found that the "present case is a classic instance for applying harmless error." Pet. App. 11. While the instructions used by the Board may have provided minority and female officers preferential treatment, the "total number of minority and female officers retained was 341." *Ibid.* The court reasoned, "[e]ven if one were to assume that every one of those officers was retained solely because of an impermissible preference accorded minorities and females—a most unlikely assumption—at most that would mean that 341 white officers who were retired should have been retained." *Ibid.* Thus, "even under the most extreme assumption only about one-third of the white [male] officers" of the more than 1000 in the class could possibly have been retained. *Ibid.* Based on these facts, the court found, "the government has demonstrated with respect to at least two-thirds of the involuntarily retired male officers that it would have retired that number even without the impermissible instruction that favored minority and female officers." *Id.* at 12.

Applying the "general rules of damages" for military back pay claims to the present case, the court held that "the applicable principle is that the retired white officers are entitled to be placed in the same position they would have been in if the Retirement Board had not

considered the impermissible factors of race and gender in determining whom to recommend for involuntary early retirement, but not in a better position." Pet. App. 12. The court added, "[w]e know of no reason, convincing or otherwise—and the Court of Federal Claims has not provided any—why [the group of retired officers who would have been retired in any event under proper instructions] * * * should receive such a substantial financial windfall representing back pay they could not and would not have received even if the Retirement Board proceedings had been wholly free from the taint the Court of Federal Claims found in them." *Id.* at 13.

Finally, the court of appeals rejected the Court of Federal Claims' reliance on the constructive service doctrine as a basis for rejecting the harmless error claim in this case. Pet. App. 17-18. "Under that doctrine, military personnel who have been illegally or improperly separated from service are deemed to have continued in active service until their legal separation. They are, therefore, entitled to back pay and benefits for the intervening period, i.e., retroactive to their original separation from service." *Id.* at 17 (citation omitted). The court explained, "[n]othing in the constructive service doctrine is inconsistent with applying harmless error in this case." *Ibid.* That doctrine "was designed to permit the award of back pay to a service person who had been injured by the improper termination of his service, and thereby denied the financial and other benefits he should and would have received but for the improper termination." *Ibid.* The court reasoned, "[i]n the present case, the retired white officers who would have been retired even if the impermissible instruction had not been given to the Retirement Board cannot be properly viewed as having had their military

service improperly terminated, and they therefore have not been injured." *Id.* at 17-18. Thus, the court of appeals held that there is "no occasion to invoke the constructive service doctrine" in this case, since plaintiffs who would have been discharged in any event "have no claim, legal or equitable, to back pay for any period during which they did not perform military duty." *Id.* at 18.

In remanding the case to the Secretary, the court left open to the Secretary to decide what procedure would best determine which individuals would have been retained under proper instructions. Pet. App. 21-22. The court explained that "[o]nce the Secretary determines which members of the plaintiff class are entitled to reinstatement and back pay, the case will be returned to the Court of Federal Claims to consider any challenges to the Secretary's decision and to formulate an appropriate judgment." *Id.* at 22.

ARGUMENT

The court of appeals' decision is interlocutory, correct, and does not conflict with any decision of this Court or of any court of appeals. The court applied established precedent in concluding that not all members of a class that is nearly three times larger than the number of potential victims can recover for claims of unconstitutional discrimination. Moreover, any complaints raised by petitioners about how the remand proceedings may be conducted are premature. Finally, because of the enactment of new legislation, the petition does not present an issue of ongoing importance. Accordingly, review by this Court is not warranted, and the petition should be denied.

1. This Court's customary practice is to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). There is no reason for the Court to depart from—and strong reasons for the Court to follow—that practice in this case.

The court of appeals reversed the district court's holding that a class far larger than the universe of potential victims could recover for claims of unconstitutional discrimination and remanded the case to the Secretary of the Army, and then to the Court of Federal Claims, to identify the injured individuals and for further proceedings to determine the appropriate judgment for injured class members. Pet. App. 21a-22a. The Secretary's and the Court of Federal Claims' resolution of those issues could influence the Court's decision whether to grant review of the question presented in the petition, and the pendency of those issues counsels against piecemeal review of petitioners' claims at this time. See *Virginia Military Inst.*, 508 U.S. at 946 (Scalia, J., respecting the denial of certiorari) (noting appropriateness of denying interlocutory petition where court of appeals remanded "for determination of an appropriate remedy").

2. Even if petitioners' claims were not premature, review by this Court still would be unwarranted.

a. The court of appeals correctly held that petitioners' claims of discrimination in favor of women and minorities in the instructions applied by the 1992 Retirement Board are subject to a harmless error analysis. In *Texas* v. *Lesage*, 528 U.S. 18 (1999), this

Court held that a plaintiff cannot prevail on a discrimination claim by simply pointing to the fact that the government used discriminatory or other impermissible considerations. "[E]ven if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Id.* at 20-21. Thus, the Government must be granted the opportunity to "avoid liability by proving that it would have made the same decision without the impermissible motive." *Id.* at 21.

The court of appeals properly followed *Lesage* and held that the government must have the opportunity to demonstrate which of the class members would have been retired even under proper instructions.[2] Pet. App. 7-14. That application of established law does not warrant this Court's review. As the court of appeals recognized, this "case is a classic instance for applying harmless error." *Id.* at 11. Notably, petitioners do not contest the court of appeals' conclusion that at most 341 minorities and women were retained as a result of the 1992 EO instruction. Nor do they contest the court's finding that, even under an improbable worst case scenario, 341 white men at most could have been displaced by minorities and women as a result of the 1992 Board. The court of appeals properly held that, under *Lesage*, the government must be afforded an

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[2] Petitioners erroneously state that in this case "[l]iability was established" and was "uncontested on appeal." Pet. 9. As the court of appeals recognized, while respondent did not challenge in this interlocutory appeal the trial court's finding that the EO instruction was unlawful, it did contest the consequences of that finding in the Court of Federal Claims and throughout the Government's appeal.

opportunity to avoid liability by proving which of the white male officers were in fact displaced and which were not in fact harmed by the improper instructions.

b. The court of appeals' ruling is also consistent with longstanding precedent regarding military back pay claims. In such cases, the courts have long held that the government can avoid liability to a plaintiff if it can demonstrate that, notwithstanding the alleged error, the plaintiff suffered no tangible injury—*i.e.*, the plaintiff would not have been granted the promotion or avoided retirement in any event. *Hary* v. *United States*, 618 F.2d 704, 707 (Ct. Cl. 1980); Pet. App. 10-11. As the court of appeals explained, "an officer cannot prevail in a challenge to a discharge after non-promotion if the government can demonstrate that, notwithstanding the error in the promotion proceedings, the officer still would not have been promoted." Pet. App. 10-11; see *Porter* v. *United States*, 163 F.3d 1304, 1318 (Fed. Cir. 1998) ("[T]he quintessential military promotion question" is "whether it is unlikely that he * * * would have been promoted in any event.") (citation and internal quotation marks omitted), cert. denied, 528 U.S. 809 (1999).[3]

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[3] Consistent with Title VII's objective "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975), the harmless error approach is similarly applied in Title VII employment discrimination cases. See, *e.g.*, *United States* v. *City of Miami*, 195 F.3d 1292, 1299 (11th Cir. 1999), cert. denied, 531 U.S. 815 (2000); *Arnold* v. *United States Dep't of the Interior*, 213 F.3d 193, 198 (5th Cir. 2000) ("[T]he plain language of § 2000-e5(g)(2)(B)(ii) forbids an award of compensatory damages to a job applicant who, despite unlawful discrimination, still would not have received the job."), cert. denied, 531 U.S. 1144 (2001).

Refusal to apply a harmless error analysis in this context would not only be contrary to *Lesage* and the military pay cases, it would lead to a $100 million windfall to parties who were not in fact injured by the erroneous instruction. Pet. App. 13. "The harmless error doctrine is designed to prevent just such a result." *Ibid.*

Petitioners in the court of appeals admitted to the extreme nature of their position. They agreed that under their theory even if *one* female or minority was retained as a result of the 1992 Board instructions, then *all 1030* white men who were not retained would have the right to full back pay and benefits. As the court of appeals held, such a result is both plainly untenable and contrary to controlling precedent.

c. Contrary to petitioners' assertion (Pet. 14-18), there is no circuit conflict presented warranting this Court's review. Petitioners cite *Doyle* v. *United States*, 599 F.2d 984, as amended, 609 F.2d 990 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980), and *Dilley* v. *Alexander*, 603 F.2d 914 (D.C. Cir. 1979), as clarified, 627 F.2d 407 (D.C. Cir. 1980), as precluding the use of a harmless error analysis. In *Dilley* and *Doyle*, however, the promotion boards were unlawfully constituted because they did not contain the statutorily-required minimum number of reserve officers. Because the separations in those cases were conducted by a body without statutory authority, the courts concluded that it was as if the separations had never occurred.[4]

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[4] But see *Jones* v. *Alexander*, 609 F.2d 778 (5th Cir.), cert. denied, 449 U.S. 832 (1980), where the court rejected the argument accepted in *Doyle* and *Dilley* that improper composition of the Board rendered its acts a nullity. The Fifth Circuit, accordingly, approved of the use of "relook" boards to determine which officers were in fact prejudiced by the same improperly constituted boards

As the court of appeals explained (Pet. App. 13-19), *Doyle* and *Dilley* are not inconsistent with the court of appeals' holding in this case.[5] Rather, those cases provide a limited exception to the general rule that a service member or officer cannot prevail on a claim challenging a discharge after non-selection for promotion if the government can demonstrate that, notwithstanding the alleged error, he or she would not have been granted the promotion. The exception recognized in *Doyle* and *Dilley* was for cases where a promotion or selection board was illegally constituted and its actions deemed a nullity by the court. "Where the error goes * * * to the composition of the selection board * * *, the court has held the causal nexus (or, conversely, the 'harmless error') principle to be inapplicable." *Engels* v. *United States*, 678 F.2d 173, 175 n.6 (Ct. Cl. 1982). But otherwise the rule has long been that, to prevail in a military back pay case, the plaintiff must establish such a nexus. And even where the requisite error and nexus are established by a plaintiff, then "the end-burden of persuasion shifts to the [government] to show the 'harmlessness' of the error, that is, 'despite the plaintiff's prima facie case, there was no substantial nexus or connection.'" *Cunningham* v. *United States*, 39 Fed. Cl. 688, 693 (1998) (quoting *Engels*, 678 F.2d at 175); accord *Bockoven* v. *Marsh*, 727 F.2d 1558, 1563 (Fed. Cir.), cert. denied, 469 U.S. 880 (1984). "The

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at issue in *Dilley* and *Doyle*. In short, while there may be a conflict between *Doyle* and *Dilley* on the one hand and *Jones* on the other, that potential split is not implicated by this case, which involves properly constituted boards.

[5] As a court of claims opinion, *Doyle* at most could create an internal conflict within the Federal Circuit, 28 U.S.C. 1295, which would not justify review, see *Davis* v. *United States*, 417 U.S. 333, 340 (1974).

ultimate determination of prejudicial error requires prediction about how an officer's record would appear to a promotion board in the absence of the errors, and a conclusion about whether the officer would have been promoted if his record was free of error." *Lindsay* v. *United States*, 295 F.3d 1252, 1261 (Fed. Cir. 2002).

Here, in contrast to *Doyle* and *Dilley*, there was no "fundamental error * * * affecting the composition of the deciding body." *Porter* v. *United States*, 163 F.3d at 1319. The 1992 Board had proper statutory authority and was properly composed. Thus, it was a lawful entity empowered to retire individual officers, and this case "is not a challenge to the legal authority of the final decisionmaker *qua* final decisionmaker." *Wolfe* v. *Marsh*, 835 F.2d 354, 359 (D.C. Cir. 1987), cert. denied, 488 U.S. 942 (1988). The error petitioners alleged pertained to the correctness of the Board's decision, not its legal authority to issue the decision. Accordingly, as in *Lesage*, the results of the 1992 Board were merely "voidable" as to those persons who were *in fact* injured by the instructions.

d. Petitioners also argue that the "constructive service doctrine" mandates granting full back pay to all of the white male lieutenant colonels retired by the 1992 Board, even if two-thirds of them would have been retired under proper instructions. As the court of appeals held, the "constructive service doctrine" does not require such absurd results. Pet. App. 17-18. That doctrine simply means that *if* a service member is improperly discharged, then he or she continues in his or her rank until properly discharged. *Ibid.* Thus, the right to continued pay is dependent on a showing by the individual officer that he or she has been subject to an improper discharge. What petitioners here ignore is that demonstrating an *injury caused* by an alleged

error is part of the prima facie case of showing that a person was wrongfully discharged. See *Lindsay*, 295 F.3d at 1259; *Hary*, 618 F.2d at 706.

e. Petitioners also err in asserting (Pet. 14-15) that the harmless error rule is inapplicable here because the 1992 EO instruction constituted "structural error." This Court rejected the same argument in *Lesage*. There, the lower court had held that a harmless error analysis could not be applied where the standards applied by the university were biased in favor of minorities. This Court expressly rejected that argument as contrary to "well-established" precedent. 528 U.S. at 20. The Court held that even if "in making a decision adverse to the plaintiff" the court used impermissible criteria that were biased in favor of minorities, *ibid.*, a harmless error analysis still can and should be used. The government still must be furnished the opportunity to "defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Id.* at 20-21.

f. Petitioners argue that a remand in this case to permit the government an opportunity to demonstrate which of the class members would have been retired under proper instructions cannot work and will not be fair to them. Those complaints are premature and do not present an issue warranting this Court's review.

As an initial matter, these concerns regarding the efficacy of the remand are premature. In remanding the case to the Secretary, the court of appeals recognized that petitioners would have an opportunity, after the remand, to challenge the Secretary's findings in the Court of Federal Claims. Pet. App. 21-22 ("[o]nce the Secretary determines which members of the plaintiff class are entitled to reinstatement and back pay, the case will be returned to the Court of Federal Claims to

consider any challenges to the Secretary's decision and to formulate an appropriate judgment").

Petitioners contend that a remand cannot work because the ranking lists created by the 1992 board no longer exists. Pet. 14. In so arguing, petitioners attempt to distinguish *Texas* v. *Lesage*, *supra*, on the ground that in that case there was contemporary existing evidence that would establish whether the plaintiff would have been accepted to the university program absent consideration of the impermissible criteria. But such contemporary evidence does exist in this case. Among other things, the service records of plaintiffs and the rest of the lieutenant colonels that were subject to the 1992 Board exist, and there is no impediment to examining those records as they existed in 1992 to determine whether it is more likely than not that individual plaintiffs were not injured by the 1992 EO instructions. See *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977); *Lesage*, 528 U.S. at 21. To the extent that petitioners have any complaint about the methodology employed by the Secretary on remand, they can raise such a challenge with the Court of Federal Claims thereafter. Pet. App. 22.

Petitioners also argue that there is no statutory authority to permit this remand. Pet. 21. They admit, however, that the court has authority to "remand appropriate matters to any administrative or executive body." 28 U.S.C. 1491(a)(2). Thus, there can be no question of the statutory authority.[6]

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[6] Even if there were no authority for a remand, the result would *not* be to preclude a showing of harmless error. Rather, the result would be that the Court of Federal Claims would be required to permit the government an opportunity to demonstrate to the court which class members would have been retired in any event. Here, where what is at issue is an agency decision, the

Moreover, petitioners ignore their concession below that a reconstituted Board could be used today to limit damages prospectively. C.A. App. 833. Thus, petitioners do not really dispute that a newly constituted Board can be used to review the records of the 1992 candidates for retention and can rank them to limit damages. The only real question is whether a harmless error analysis can be employed in this context or not. Under *Texas* v. *Lesage*, *supra*, the answer is clear: the court of appeals properly afforded the government the opportunity to demonstrate that the individual plaintiffs were in fact not injured by the 1992 EO instructions.

g. Finally, the court of appeals properly recognized that enactment of 10 U.S.C. 1558 by Congress in 2001

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court of appeals correctly held that "the proper course * * * is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). This is particularly true in the military context where Congress has entrusted military selection, retention, and promotion matters to the Service Secretaries who have established a system of selection boards to rank the candidates, and where the military possesses unique qualifications and expertise for which deference is appropriate. See *Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953) ("judges are not given the task of running the [military]"); *id.* at 94 ("The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"); see also *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military * * * affairs"); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (the Constitution vests "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" exclusively in the legislative and executive branches).

has no bearing on the outcome of this case, that enactment does limit the future significance of the decision below. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, Div. A., Tit. V, § 503, 115 Stat. 1080 (to be codified at 10 U.S.C. 1558); Pet. App. 20. The new statute explicitly provides the remedy to be afforded in cases where a service member seeks to challenge an action or recommendation of a selection board. Under the new legislation, the Secretary may correct a service member's military records in accordance with a recommendation made by a special board. See § 503(a), 115 Stat. 1080 (to be codified at 10 U.S.C. 1558(a)). The judicial review portion of the statute provides that a person is not entitled to judicial relief unless the action or recommendation has first been considered by a special board or the Secretary has denied the convening of such a board for such consideration. See § 503(f)(1), 115 Stat. 1082 (to be codified at 10 U.S.C. 1558(f)(1)). Thus, the new statute provides a new mechanism for the Secretary to establish that a service member was not injured by a claimed error.

Contrary to petitioners' assertion, the fact that the statute applies prospectively does not in any way answer the question resolved by the court of appeals as to whether, *prior to* 2001, the government had the right to avoid liability to a service member by showing that the alleged non-promotion or retirement would have occurred even absent the alleged error in the instructions used by a retention or promotion board. Under *Lesage*, and the long line of military pay cases discussed above, the court of appeals correctly answered that question in the affirmative. In any event, given the enactment of the new statute, this legal issue will have little importance for future military cases similar to the

one at bar. Thus, the petition does not present an issue of ongoing importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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